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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

v.

HARVEY NOBEL,

Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The federal district judge who presided at petitioner's criminal trial, involving an alleged fraud upon the Insurance Company of North America, revealed before trial that he was a "substantial" stockholder of that company, but decided that that was not a basis upon which to recuse himself. Prior to the Third Circuit's decision in this case, no federal precedent existed requiring judicial disqualification under 28 U.S.C. §455 in a criminal prosecution, where the trial judge is a stockholder in a corporation that was the victim of the alleged crime. The Fourth Circuit had, in fact, explicitly held to the contrary.

On appeal from petitioner's conviction, the Court of Appeals became the first federal court in the country to hold that disqualification under §455(a) was

mandatory under these circumstances because the "[trial judge's] impartiality might reasonably be questioned." Simultaneously, however, the Court ruled that the failure of petitioner's counsel to object to the trial judge's refusal to disqualify himself under §455 (as contrasted with disqualification under 28 U.S.C. §144, which requires counsel affirmatively to move for a judge's disqualification) constituted a "waiver", in spite of the conceded lack of basis, as of the time of trial, for any objection.

The questions presented are:

1. Is the Court of Appeals' recognition of a new and unprecedented ground for mandatory disqualification, and its simultaneous ruling that the new right had been "waived" by petitioner by reason of his counsel's failure to object to the trial judge's participation, consistent with

decisions of this Court which hold that a party cannot, by failing to object, waive a right that did not exist at the time of trial?

2. Can a defendant in a federal criminal prosecution be held to have "waived" a ground for mandatory judicial disqualification under 28 U.S.C. §455(a) solely by virtue of his attorney's failure to move for such disqualification, in light of:

(a) express Congressional intent that waiver under 28 U.S.C. §455 should not be found except in the clearest of cases;

(b) the Government's explicit concession in this case, which the Court of Appeals' majority disregarded, that no waiver had occurred; and

(c) conflicting decisions of the Court of Appeals of the Seventh Circuit which hold that a party has no duty whatsoever to object under 28 U.S.C. §455

(as contrasted with 28 U.S.C. §144), and, therefore, that the failure to object cannot be interpreted as a tacit waiver?

3. Is the refusal of the Court of Appeals to hold that the corporate victim of the crime was the "subject matter in controversy" under the non-waivable disqualification provisions of 28 U.S.C. §455(b)(4), which is inconsistent with holdings of the Fourth Circuit, erroneous in view of the need to maintain public confidence in the integrity of the judicial process and the impartiality of judicial decision-making?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ix
Cases Cited	ix
Statutory Provisions	xi
Legislative Materials	xii
Periodicals	xii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
1. Proceedings in the District Court	4
a. Procedural History	4
b. Facts Relevant to the Issues Presented for Review	7
2. Proceedings in the Court of Appeals	9

TABLE OF CONTENTS (cont.)

PAGE

REASONS FOR ALLOWANCE OF THE WRIT 16

1. The Decision of the Court of Appeals that Petitioner, by Failing to Object, "Waived" his Right to have the Trial Judge Disqualify Himself, even though there was no Basis for Objecting as of the Time of Trial, is in Direct Conflict with Decisions of this Court. 16

2. This Court Should Grant the Petition to Resolve the Conflict between the Third Circuit and the Seventh Circuit on the Issue whether Failure to Object Can Be a "Waiver" under §455 20

3. The Decision of the Court of Appeals Frustrates Clear Congressional Intent that "Waivers" of Disqualification be Strictly Construed 23

4. The Conflicting Standards Governing Waiver of Judicial Disqualification in Federal Criminal Cases Present an Important Question of Federal Law which Should be Resolved by this Court 25

TABLE OF CONTENTS (cont.)

PAGE

5. The Court Should Grant the Writ to Review the Erroneous Decision Below that the Victim of the Crime is not the "Subject Matter in Controversy" under §455(b)(4), and to Resolve the Split between the Fourth Circuit and the Third Circuit 29

   a. The Decision is Inconsistent with Holdings of the Fourth Circuit 29

   b. The Issue Whether a Victim of an Economic Crime is Part of the "Subject Matter in Controversy" Under §455(b)(4) is an Important Question of the Federal Law of Judicial Disqualification which this Court Should Resolve. 30

CONCLUSION 32

TABLE OF CONTENTS (cont.)

PAGE

APPENDIX:

"A" - Colloquy A-1

"B" - Opinion of the United States Court of Appeals For the Third Circuit B-1

"C" - Order denying Appellant's Petition for Rehearing ... C-1

TABLE OF AUTHORITIES

PAGE

CASES:

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 17, 19

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 22

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 17

Griffin v. Illinois, 351 U.S. 12 (1956) 19

Hormel v. Helvering, 312 U.S. 552 (1941) 17

In Re Murchison, 349 U.S. 133 (1955) 23

In Re Rodgers, 537 F.2d 1196 (4th Cir. 1976) 29

Johnson v. Zerbst, 304 U.S. 458 (1938) 18

Linkletter v. Walker, 381 U.S. 618 (1965) 20

TABLE OF AUTHORITIES (cont.)

PAGE

CASES (Continued):

Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir. 1980) 25

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) 20, 21

School District of Kansas City, Mo. v. State of Missouri, 438 F.Supp. 830, 835-36 (W.D. Mo. 1977) 26

Tumey v. Ohio, 273 U.S. 510 (1927) 23

United States v. Poludniak, 657 F.2d 948, 954 (8th Cir. 1981) cert. denied, 102 S.Ct. 1431 (1982) 26

United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970) 16, 18

United States v. Schooner Peggy, 1 Cranch. 103 (1801) 20

TABLE OF AUTHORITIES (cont.)

PAGE

CASES (Continued:

United States v. Sellers,
566 F.2d 884
(4th Cir. 1977) 13, 16, 18

STATUTES:

18 U.S.C. §2314 4

28 U.S.C. §144 11

28 U.S.C. §455 ..... i, ii, iii, 2, 3, 7
11, 12, 15, 16, 20,
21, 22, 23, 24, 25, 27

Subsection (a) ..... i, iii, 9, 10, 11,
12, 13, 14, 16, 20

Subsection (b)(2) 29

Subsection (b)(4) .. iv, 9, 10, 12, 14,
15, 17, 29, 30, 31

Subsection (e) 10, 31

28 U.S.C. §1254(1) 3

TABLE OF AUTHORITIES (cont.)

PAGE

LEGISLATIVE MATERIALS:

H.R. REP. NO. 1453, 93rd Cong., 2d Sess, reprinted in 1974 U.S. Code Cong. & Ad. News 6351 24

Hearings on S.104 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess. 11 (1974) 28

PERIODICALS:

Frank, Commentary on Disqualification of Judges - Canon 3C 1972 Utah L. Rev. 377 (1972) 26

Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973) 26

Note, Disqualification of Judges for Bias or Prejudice - A New Approach, 1972 Utah L. Rev. 448 (1972) 26

TABLE OF AUTHORITIES (cont.)

PAGE

PERIODICALS (Continued)::

Note, Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. §455, 1978 U.Ill. L.F. 863 (1978) 26

Note, Meeting the Challenge: Rethinking Judicial Disqualification, 69 Calif.L.Rev. 1445 (1981) 28

Note, The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455, 25 DePaul L. Rev. 104 (1975) 27

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HARVEY NOBEL,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Harvey Nobel ("Nobel"), prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on December 17, 1982.

OPINIONS BELOW

There was no opinion by the district judge refusing to recuse himself. The colloquy between the Court and counsel, in which the district judge stated that his ownership of stock in the Insurance Company of North America ("INA"), the victim of the alleged crime, did not require his disqualification under 28 U.S.C. §455, is set forth as Appendix "A" hereto. The majority opinion of the panel of the Court of Appeals, and the concurring opinion, both dated December 17, 1982, are as yet unreported and are therefore attached as Appendix "B" hereto. The Order of the Court of Appeals denying the petition for rehearing, dated January 5, 1983, without opinion, is attached hereto as Appendix "C".

JURISDICTION

The Court of Appeals entered judgment on December 17, 1982. A timely petition

for rehearing was filed on December 27, 1982, and denied on January 5, 1983. A motion for stay of mandate pending application to this Court for a writ of certiorari was filed on January 11, 1983, and an order was entered on January 19, 1983, staying issuance of the mandate until February 11, 1983, which was subsequently extended on motion to March 7, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §455 provides, in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing

in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

* * *

(4) "financial interest" means ownership of a legal or equitable interest however small....

* * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under sub-section (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

1. Proceedings in the District Court.

a. Procedural History.

On December 15, 1981, Nobel and one Christine Gilch ("Gilch") were indicted for having violated 18 U.S.C. §2314

(interstate transportation of a security taken by fraud). The indictment alleged that Nobel, the owner of a towing service in New Jersey, and Gilch, an employee of INA, devised and carried out a scheme to defraud INA, as a result of which a total of $476,000 was wrongfully diverted from INA.

Gilch pled guilty. Nobel pleaded not guilty, and was tried before the Honorable John B. Hannum and a jury. During the trial, Gilch, who was called as a witness by the Government under a grant of immunity, and Nobel, who took the stand in his own defense, both testified that Nobel knew nothing of the fraudulent nature of the scheme, which Gilch alone had devised, and that Nobel believed at all times that the arrangement he had with INA was a legitimate commercial transaction to

supply stand-by towing services to INA. Nobel also testified that, immediately upon learning from Gilch that the arrangement was not proper, he telephoned an appropriate officer of INA and offered to make full restitution of all funds received. Indeed, within a week, Nobel repaid to INA the sum of $300,000, agreed to repay the balance (including 15% interest) at the rate of $5,000 per month, and gave INA first liens on various real and personal property to secure the obligation.

After a three-day trial, and 7-1/2 hours of deliberation, the jury found Nobel not guilty on Count I (receipt of the first check in the series), but guilty on all other Counts. On April 13, 1982, Judge Hannum sentenced Nobel to a term of imprisonment for two and one-half years on

each Count, all sentences to be served concurrently.[1/]

From the judgment and commitment order entered on that sentence, Nobel took an appeal to the Third Circuit.

b. Facts Relevant to the Issues Presented for Review.

Moments before Nobel's trial was scheduled to begin on March 15, 1982, Judge Hannum called counsel into chambers for a discussion concerning the necessity for his disqualification under 28 U.S.C. §455. At that time, the following colloquy, which is set forth in its entirety, occurred:

> THE COURT: Counsel will recall a conference on the 18th of

1/ Although typically the sentence in a case such as this would include restitution to the victim -- here, INA -- Judge Hannum had no occasion to order restitution because Nobel had already agreed to repay the amount in full, and had begun to do so.

December, 1981, at 8:30 A.M.,2/ and I related that I am a substantial holder of INA stock.

INA is not a party; nor is it the subject matter.

I related that I didn't believe it was a basis for recusal.

Now, when we had this conference neither Mr. Casper [Gilch's attorney] nor Mr. Nasuti [Nobel's attorney] were yet retained and my notes reflect that Mr. Casper anticipated no problem, and if, as I believe, there is not basis for recusal, would you, if you are so disposed, so relate.

MR. NASUTI: Me, Your Honor?

THE COURT: Yes.

MR. NASUTI: Yes, Your Honor.

THE COURT: So you agree there is no basis for recusal.

MR. NASUTI: My research reveals that, agrees with Your Honor.

THE COURT: All right.

MR. NASUTI: With Your Honor's research and conclusion.

2/ The conference of December 18, 1981, was not recorded stenographically.

(emphasis added.) (App. at A-1.)

The Court of Appeals majority (App. at B-12), the concurring circuit judge (App. at B-16), and the Government all concede that the trial judge and counsel did not even mention, much less address, the disqualification requirements of §455(a), as opposed to those of §455(b)(4), at this conference. The issue of the judge's substantial ownership interest in INA was never again referred to either by the judge or counsel during the remainder of the proceedings.

2. Proceedings in the Court of Appeals.

On appeal, Nobel made the following contentions:

(a) the trial judge was required to have disqualified himself under 28 U.S.C. §455(b)(4) because he was a substantial holder of INA stock, and because

INA, its assets, corporate policies and procedures, and interests comprised part of the "subject matter in controversy" under that subsection, which provides that a judge "...shall...disqualify himself... [when he] has a financial interest in the subject matter in controversy...;"

(b) alternatively, the trial judge was required to have disqualified himself under 28 U.S.C. §455(a) because, as a "substantial" holder of stock in the victim of the alleged crime, his "impartiality might reasonably be questioned;"

(c) the colloquy in chambers prior to trial could not constitute a waiver of grounds for disqualification under §455(b)(4), since by reason of §455(e) a judge may never accept a waiver of any ground for disqualification set forth in §455(b);

(d) the colloquy could not constitute a waiver of grounds for disqualification under §455(a) because, inter alia, the issue of disqualification on the grounds set forth in §455(a) was never addressed during the colloquy, the colloquy itself was equivocal, and, under §455 (unlike 28 U.S.C. §144) a party is under no duty whatsoever to object; and

(e) even if a waiver could have been found under these circumstances, the trial judge's failure to recuse himself was "plain error".

The Government, in its brief, conceded that there had been no waiver of any ground for disqualification under §455(a) because the colloquy did not address any issues arising under that subsection. (The Government attorney on the brief was also present during the

in-chambers colloquy.) The Government argued only that disqualification was not required under §455 - a position the Court of Appeals rejected.

On December 17, 1982, a panel of the Third Circuit issued its decision by way of a majority and concurring opinion. The panel first held that INA was not the "subject matter in controversy", and that the trial judge was not required under §455(b)(4) to recuse himself.

Two members of the panel then held, however, for the first time in any reported decision in the United States, that the trial judge should have recused himself under §455(a) because, in view of his ownership of stock in INA, "his impartiality might reasonably be questioned". In so holding, the majority recognized that it was announcing a new rule of law, and

one that squarely conflicted with the decision of the Fourth Circuit in United States v. Sellers, 566 F.2d 884 (4th Cir. 1977). Nevertheless, the majority affirmed Nobel's conviction and sentence because it held, ignoring the Government's explicit concession, that Nobel had "waived" the issue of disqualification because his counsel had failed to object.

By contrast, Judge Rosenn, in his concurring opinion, took strong exception to the finding of waiver, which he described as being "extremely ill-advised":

> ...it is not clear on the record in this case that the defendant elected to waive the general disqualification provision contained in section 455(a) of the statute.... The majority concedes that in this discussion [among the Court and counsel] the parties and the district court were focusing their attention on section

> 455(b)(4) and did not address the disqualification requirements of section 455(a).... Indeed, even the Government acknowledged this point in its brief:
>
> > [T]he government will not argue to this Court that Nobel waived his right to seek disqualification under Section 455(a). The government believes that there is some force to Nobel's argument (Brief at 13-14) that the colloquy did not specifically address disqualification under Section 455(a).... Accordingly, the government does not argue here that Nobel waived the protection of Section 455(a).
>
> Because there is no dispute between the parties to this case as to whether Nobel waived his rights under section 455(a), I believe it is extremely ill-advised for this court to use the instant case as a vehicle to enter into an examination of the waiver question and ultimately to dispose of the case on a ground that the United States has seen fit to concede.

App. at B-16.

Nobel filed a petition for rehearing on December 27, 1982 on the

grounds: (a) that it was the explicit intention of Congress that waiver occur only in the clearest of cases, (b) that the colloquy on which the Court relied to find waiver was equivocal at best, (c) that there cannot be a waiver because of a failure to object since, under §455, counsel has no duty to object in the first instance, and (d) that the Court's decision, which had made new law, was being applied against Nobel as if it had been the law at the time of his trial, so as to create a "waiver", contrary to rulings of this Court and the Third Circuit. Nobel also requested reconsideration of the panel's adverse decision concerning the applicability of §455(b)(4). The petition for rehearing was denied on January 5, 1983, without opinion.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Decision of the Court of Appeals that Petitioner, by Failing to Object, "Waived" his Right to have the Trial Judge Disqualify Himself, even though there was no Basis for Objecting as of the Time of Trial, is in Direct Conflict with Decisions of this Court.

The decision of the Court of Appeals that disqualification was required under §455(a) made new law. Nevertheless, the Court refused to reverse Nobel's conviction only because his trial counsel failed to register an objection for which, as of the time of trial, there was no supporting case law. Indeed, the only other federal decision on point, United States v. Sellers, 566 F.2d 884 (4th Cir. 1977),[3/]

3/ A second federal decision, United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970), cert. denied, 400 U.S. 834, also held that disqualification was not mandatory, but it was decided under an earlier version of §455.

held that disqualification was not mandatory. Therefore, in ruling that Nobel waived this issue by failing to object at trial, the Third Circuit imposed its decision upon him, to his detriment, as if it had been the law at the time of trial. This is impermissible. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). See, also, Hormel v. Helvering, 312 U.S. 552, 556-59 (1941).

In the colloquy before trial, defense counsel's "failure to object" was, in reality, nothing more than a direct answer to the district court's pointed, and rather coercive, inquiry whether there was any precedent that would require his disqualification under §455(b)(4):

> THE COURT: ...If, as I believe, there is not basis for recusal,

would you, if you are so disposed, so relate.

MR. NASUTI: Me, Your Honor?

THE COURT: Yes.

MR. NASUTI: Yes, Your Honor.

THE COURT: So you agree there is no basis for recusal.

MR. NASUTI: My research reveals that, agrees with Your Honor.

The extent of defense counsel's research does not appear of record, but presumably he found the very same circuit court cases, United States v. Sellers, supra, and United States v. Ravich, supra, which the Court of Appeals found and rejected. Under those circumstances, defense counsel simply had no basis upon which to object. A waiver is "...an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It is impossible for a party to "waive" a right by failing to

object at a time when, as in this case, he could not have known that the right existed. As this Court has said:

> We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.

Chevron Oil Co. v. Huson, supra, at 107, quoting from Griffin v. Illinois, 351 U.S. 12, 26 (1956)(Frankfurter, J., concurring).

In applying its decision against Nobel as if it had been the law at the time of trial, the Court of Appeals has established a precedent which is fundamentally unfair, especially in the context of the criminal justice system. The decision is also inconsistent with a long line of decisions by this Court which hold that a change in law will be given effect while a case is on

direct review. United States v. Schooner Peggy, 1 Cranch. 103 (1801); Linkletter v. Walker, 381 U.S. 618, 627 (1965) and cases cited at n.11. The decision should therefore be reviewed and reversed.

2. This Court Should Grant the Petition to Resolve the Conflict between the Third Circuit and the Seventh Circuit on the Issue whether Failure to Object Can Be a Waiver under §455.

The panel majority found, despite the Government's concession to the contrary, that a waiver had occurred by virtue of Nobel's "failure to object." App. at B-12. This decision directly conflicts with that of the Seventh Circuit in SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977). In that case, after first concluding that the trial judge should have disqualified himself under §455(a), the Seventh Circuit held that a party could not

waive disqualification simply by failing to object, because under §455 a party has no duty to object in the first instance. The Court stated:

> As a defense to the proceedings in this Court, respondent Lucky Stores claims that disqualification is not required because SCA has waived its right to enforce section 455.... Lucky Stores cites no case or other authority, however, to support its estoppel theory. Indeed, there is no basis in law to support this argument.... The provisions [of §455] are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed "that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." [Footnote omitted.] They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit.

Id. at 117 (emphasis added).

One reason for enacting the current version of 28 U.S.C. §455, which places the responsibility for raising the issue of disqualification upon the judge, was to avoid the confrontation which inevitably arises when counsel is forced to move for judicial disqualification. Therefore, the conflict between the Third and Seventh Circuits is particularly significant because it goes directly to the relative responsibilities of lawyers and judges in dealing with issues of potential judicial disqualification. As this Court has stated, "...any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968). Issues of disqualification can rise to constitutional

dimension. In re Murchison, 349 U.S. 133 (1955)(judge who sat as "judge-grand jury" could not preside over trial of person accused of testifying perjuriously before the "judge-grand jury"); Tumey v. Ohio, 273 U.S. 510 (1927)(judge cannot have direct pecuniary interest in the result of his judgment). Because of the importance of this issue, the conflict concerning the procedure by which it is to be raised and decided should be resolved by this Court.

3. The Decision of the Court of Appeals Frustrates Clear Congressional Intent that "Waivers" of Disqualification be Strictly Construed.

Congress has stated unequivocally that waiver of judicial disqualification under 28 U.S.C. §455 should be recognized only in the clearest of cases:

> ...the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.

H.R.Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 6357 (hereafter, the "House Report"). The Third Circuit has plainly disregarded this legislative mandate, as evidenced by the decision in this case. As noted earlier, the Government, in its brief, declined to argue that a waiver had occurred and in fact expressly conceded that Nobel had not waived this issue. This concession by the Government attorney who not only signed the brief, but also was present during the colloquy, should have been accepted as establishing conclusively that no waiver--and most certainly no clear waiver--occurred. To hold under such equivocal circumstances that petitioner had "waived" his rights undercuts the very purpose for which the Third Circuit in this very case said that the statute was

enacted -- that of enhancing "...public confidence in the integrity of the judicial process...." (App. at B-11.) The Court of Appeals' finding of waiver, in the face of the Government's concession that there was no waiver, cannot be squared with the obvious intent of Congress in enacting §455.

4. The Conflicting Standards Governing Waiver of Judicial Disqualification in Federal Criminal Cases Present an Important Question of Federal Law which Should be Resolved by this Court.

"[T]he goal of [28 U.S.C. §455] is to foster the appearance of impartiality,... [and] stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence.... Any question of a judge's impartiality threatens the purity of the judicial process and its institutions." Potashnick v.

ort City Construction Co., 609 F.2d 1101, 1111 (5th Cir. 1980) (emphasis in original).[4/]

When a judge whose impartiality can reasonably be questioned - because, for example, he owns stock in the very company that is the victim of an alleged crime - is permitted to preside at trial, and ultimately to impose sentence - which might

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4/ See also House Report at 6355; United States v. Poludniak, 657 F.2d 948, 954 (8th Cir. 1981) cert. denied, 102 S.Ct. 1431 (1982); School District of Kansas City, Mo. v. State of Missouri, 438 F.Supp. 830, 835-36 (W.D. Mo. 1977); Note, Disqualification of Judges for Bias or Prejudice - A New Approach, 1972 Utah L. Rev. 448, 450 (1972); Note, Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. §455, 1978 U. Ill. L. F. 863, 871 (1978); Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 745 (1973).

include restitution to the victim - the integrity of the judicial process is undermined. This undesirable effect is compounded where the Court finds a "waiver" based on controversial circumstances and conflicting standards. Casual findings of waiver can damage public confidence in the judicial system. "Waiver has a way of becoming a velvet black jack.... In the conventional hometown courthouse situation...waiver is simply a device for bludgeoning counsel who will have to appear before the judge again and again. It reduces disqualification to a shell." Frank, Commentary on Disqualification of Judges - Canon 3C, 1972 Utah L. Rev. 377, 387 (1972).[5/]

5/ See, also, Note, The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455, 25 DePaul L. Rev. 104, 122 (1975);

In short, the existing conflict among the circuits on the standards for waiver is of crucial importance. The district courts and trial counsel, faced with conflicting precedent, are without guidance as to (1) whether counsel has any duty to object, (2) when the issue of disqualification can or must be raised, and (3) what action constitutes waiver of disqualification.

The Court should grant the writ to resolve these uncertainties.

5/ (cont.)

Statement of Chief Justice Traynor in Hearings on S. 104 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess. 11, 20 (1974); Note, Meeting the Challenge: Rethinking Judicial Disqualification, 69 Calif. L. Rev. 1445, 1463 (1981).

5. The Court Should Grant the Writ to Review the Erroneous Decision Below that the Victim of the Crime is not the "Subject Matter in Controversy" under §455(b)(4), and to Resolve the Split between the Fourth Circuit and the Third Circuit.

a. The Decision is Inconsistent with Holdings of the Fourth Circuit.

The Court of Appeals also held that disqualification was not required under the provisions of §455(b)(4) on the ground that the victim of the crime is not part of the "subject matter in controversy" in a criminal proceeding. The Court failed to acknowledge the Fourth Circuit's decision in In Re Rodgers, 537 F.2d 1196 (4th Cir. 1976), interpreting the nearly-identical phrase "matter in controversy" in §455(b)(2) specifically to include a business transaction involving Pimlico racetrack which was not part of the criminal

indictment, but which was pertinent to the defense intended to be presented. 537 F.2d at 1198. If the trial judge had held a financial interest in the Pimlico Racetrack, as the trial judge here did in INA, the Fourth Circuit certainly would have directed his disqualification under §455(b)(4).

b. The Issue Whether a Victim of an Economic Crime is Part of the "Subject Matter in Controversy" Under §455(b)(4) is an Important Question of the Federal Law of Judicial Disqualification which this Court Should Resolve.

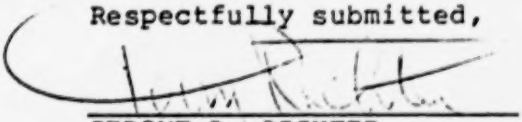
There are four reasons why this issue is of particular importance, and the conflict between circuits should be resolved. First, as noted above, there is the strong need to maintain public confidence in the integrity of the judicial process, which can only be accomplished by

maintaining the impartiality of judicial decision making. Second, there is the need to avoid the coercive effect of requiring defense counsel to object to the failure of a trial judge to disqualify himself. This can be avoided completely if disqualification is required under §455(b)(4), because it is non-waivable. 28 U.S.C. §455(e). Third, it is to be expected that this issue will arise with greater and greater frequency in the future, considering the increased emphasis which federal prosecutors are placing upon the prosecution of so-called white collar economic crimes. And fourth, issues of judicial disqualification in the federal courts should not be resolved differently depending upon the circuit in which they arise.

CONCLUSION

For all of the reasons set forth above, Harvey Nobel requests that the petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX "A"

THE COURT: Counsel will recall a conference on the 18th of December, 1981, at 8:30 A.M., and I related that I am a substantial holder of INA stock.

INA is not a party; nor is it the subject matter.

I related that I didn't believe it was a basis for recusal.

Now, when we had this conference neither Mr. Casper [Gilch's attorney] nor Mr. Nasuti [Nobel's attorney] were yet retained and my notes reflect that Mr. Casper anticipated no problem, and if, as I believe, there is not basis for recusal, would you, if you are so disposed, so relate.

MR. NASUTI: Me, Your Honor?

THE COURT: Yes.

MR. NASUTI: Yes, Your Honor.

THE COURT: So you agree there is no basis for recusal.

MR. NASUTI: My research reveals that, agrees with Your Honor.

THE COURT: All right.

MR. NASUTI: With Your Honor's research and conclusion.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1234

UNITED STATES OF AMERICA

vs.

NOBEL, HARVEY

Harvey Nobel,

Appellant

(D.C. Crim. No. 81-00367-02)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, SLOVITER and ROSENN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on November 15, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 16, 1982, be, and the same is hereby affirmed.

ATTEST:

Sally Mrvos

Clerk

December 17, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1234

UNITED STATES OF AMERICA

v.

HARVEY NOBEL,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 81-00367-02)

Submitted Under Third Circuit Rule 12(6)
November 15, 1982

Before: ALDISERT, ROSENN and
SLOVITER, *Circuit Judges*

(Opinion filed December 17, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

Defendant Harvey Nobel appeals from the judgment of conviction entered after a jury found him guilty on fourteen counts of a fifteen-count indictment charging violation of 18 U.S.C. §2314 (interstate transportation of a security taken by fraud). Nobel contends that the judgment of the district court should be reversed and the case remanded for a new trial because the trial judge failed to disqualify himself as required under 28 U.S.C. §455 and the trial judge's tone of voice in addressing Nobel during the course of his testimony improperly communicated to the jury the judge's view that Nobel was guilty. We will affirm.

I.

The Recusal Issue

The indictment charged that Nobel, the owner of Beaverbrook Motors, a New Jersey towing service, and Christine Gilch, an employee of Insurance Company of

North America [INA], devised a scheme to defraud INA pursuant to which INA paid Nobel's company approximately $476,000 for nonexistent towing services. Gilch pled guilty. Nobel pled not guilty and his five-day jury trial began March 15, 1982.

On that day, shortly before the beginning of trial, the following colloquy occurred in the chambers of the district court:

> THE COURT: Counsel will recall a conference on the 18th of December, 1981, at 8:30 A.M., and I related that I am a substantial holder of INA stock.
>
> INA is not a party; nor is it the subject matter.
>
> I related that I didn't believe it was a basis for recusal.
>
> Now, when we had this conference neither Mr. Casper [Gilch's attorney] nor Mr. Nasuti [Nobel's attorney] were yet retained and my notes reflect that Mr. Casper anticipated no problem, and if, as I believe, there is not basis for recusal, would you, if you are so disposed, so relate.
>
> MR. NASUTI: Me, Your Honor?
>
> THE COURT: Yes.
>
> MR. NASUTI: Yes, Your Honor.
>
> THE COURT: So you agree there is no basis for recusal.
>
> MR. NASUTI: My research reveals that, agrees with Your Honor.
>
> THE COURT: All right.
>
> MR. NASUTI: With Your Honor's research and conclusion.

(31a-32a). There is no dispute that the December 18, 1981 conference occurred, albeit unreported. There was no further discussion of recusal following the March 15, 1982 conference.

Section 455 provides in pertinent part:

(a) Any justice, judge, or magistrate of the United

States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(4) [When] [h]e knows that he, individually or as a fiduciary, or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

. . . .

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

. . . .

(4) "financial interest" means ownership of a legal or equitable interest, however small . . . .

. . . .

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. §455 (1976 & Supp. IV 1980).

The statute on judicial disqualification in its present form was enacted in 1974 after Congress recognized that the "uncertain language" in the prior statute requiring disqualification "in any case in which [the judge] has a substantial interest" placed "the judge on the horns of a dilemma". H.R. Rep. No. 1453, 93d Cong., 2d Sess. 2, *reprinted* in 1974 U.S. Code Cong. & Ad. News

6351, 6352 [hereinafter "House Report"]. In an effort to ameliorate that situation, Congress turned to the language of the 1972 American Bar Association Code of Judicial Conduct which had been adopted by the Judicial Conference of the United States in 1973. In amended section 455, Congress used language which paralleled that of Canon 3C of the Code dealing with disqualification in most significant respects.[1]

Subsection (a) of section 455 sets out the general policy of disqualification "in any proceeding in which [the judge's] impartiality might reasonably be questioned." The general language of this subsection is particularized in subsection (b) which enumerates specific disqualification standards which were designed to "eliminate the uncertainty and ambiguity arising from the language in the [prior] statute." House Report at 5-6, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6355.

Subsection (b)(4) deals with disqualification either because of a "financial interest" held by the judge, the judge's spouse or minor child living at home or because such persons have another interest that could be substantially affected by the outcome of the proceedings. Such an interest is disqualifying in three instances. Two are not applicable here and defendant does not suggest otherwise. The district judge's financial interest in INA is patently not in "a party" since the only parties in a criminal action other than the United States are the named defendants. Similarly, under the circumstances in this case the judge's financial interest in INA was not

1. Section 455 as amended in 1974 allowed the parties to waive a disqualification ground arising under §455(a), but prohibited waiver of the specific grounds for disqualification enumerated in §455(b). At that time, the Code permitted a waiver of a financial interest of the judge in a party or the subject matter if it was "insubstantial", and a family relationship of the judge to a party or lawyer if it was "immaterial." Code of Judicial Conduct Canon 3D (1972). Canon 3D was amended in 1979 to conform to the statute; it is now substantively identical to §455(e). Differences exist with regard to the manner of effectuating a waiver. *See* text at 10-11 *infra*.

an interest "that could be substantially affected by the outcome of the proceeding". In some instances, the resolution of a criminal proceeding might have a substantial effect upon the financial affairs of the victim company, such as by triggering personal liability of the defendant, insurance payments, or even the application of collateral estoppel which could in turn "substantially affect" the interests of stockholders of the victim company. *See, e.g., Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). In this case, however, by the time of the criminal trial a settlement had been effected which called for defendant to repay INA for substantially all of the funds which defendant received as a result of the fraud.[2] Therefore, whatever applicability this statutory language might have in another instance, it did not mandate disqualification in this case.

Accordingly, defendant's argument for the applicability of subsection (b)(4) focuses upon his claim that a financial interest in the victim of a crime is a financial interest in "the subject matter in controversy". The accepted standard for reviewing judicial disqualification decisions is to determine whether there has been an abuse of discretion. *United States v. Schreiber*, 599 F.2d 534, 536 & n.1 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979). However, whether a financial interest in a corporation which was the victim of the crime at issue is a "financial interest in the subject matter in controversy" is a matter of law as to which our review is plenary.

We conclude that the defendant's construction of "subject matter in controversy" as encompassing the crime victim is not the plain meaning of the language. In a criminal action, the victim is not the "matter acted upon", the "matter presented for consideration", nor "the topic of dispute in a legal matter", which are the

2. Under the settlement agreement, defendant agreed to pay $523,412.72 as of October 28, 1981, which is almost $50,000 more than was taken from INA and which was apparently calculated by applying an interest rate of 15%.

only arguably relevant definitions of "subject matter". *See* Webster's Third New International Dictionary (1961). The affairs of INA, the company defrauded, were not being resolved by the criminal proceeding nor were they the topic of dispute.[3]

A similar statutory construction was reached in *Department of Energy v. Brimmer*, 673 F.2d 1287, 1295 (Temp. Emer. Ct. App. 1982), where the court stated, "[t]he use of the term 'subject matter' suggests that this provision of the statute will be most significant in *in rem* proceedings." The court held that a judge who owned stock in other participants in a federal Entitlements Program administered by the Department of Energy but who did not have stock in the refiner whose claims were at issue did not have a financial interest in the subject matter of the litigation. We hold that a judge presiding over a criminal action who holds stock in a corporate victim of the crime does not have a "financial interest in the subject matter in controversy."

Defendant argues that even if disqualification was not required under section 455(b)(4), the judge should have disqualified himself under section 455(a) because "his impartiality might reasonably be questioned." Congress designed this general standard "to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." House Report at 5, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6354-55. The focus under the statute is on the objective appearance of bias, rather than

3. In United States v. Ravich, 421 F.2d 1196, 1205-06 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), decided before the statute was amended to its present form, the court held that a judge who owned shares of stock in a bank that was robbed had no financial interest in the criminal case because the result in the prosecution could make no difference to the bank or its shareholders. *See also* United States v. Sellers, 566 F.2d 884, 886-87 (4th Cir. 1977).

bias-in-fact. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); Note, *Judicial Disqualification in the Federal Courts: Maintaining an Appearance of Justice Under 28 U.S.C. §455*, 1978 U. Ill. L.F. 863, 871; Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 (1973).

We recognize that there have been cases in which appellate courts have held that a trial judge's financial interest in the victim of a crime did not require disqualification in the subsequent criminal proceeding. *In United States v. Ravich*, 421 F.2d 1196, 1205-06 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), the court held that disqualification in such a situation was left to the conscience of the particular judge.[4] *In United States v. Sellers*, 566 F.2d 884, 887 (4th Cir. 1977), the court concluded that, "No reason appears why owning stock in a holding company owning a bank that is robbed would lead to any reasonable apprehension that the stockholder judge would be partial."[5] With deference to the other circuits, we conclude otherwise. The *Ravich* case was decided under the more subjective standard which prevailed before the 1974 amendments eliminated the subjective test.[6] The *Sellers* case was decided by a divided panel. Judge Butzner dissented, stating, "It is reasonable to conclude that any person who has substantial holdings in a bank that is the victim of a robbery

4. The trial judge's ownership of stock in the victim bank was worth between $10,000 and $15,000 which represented .0072% of the bank's 5,391,527 shares. 421 F.2d at 1205.

5. The value of the stock in question does not appear from the opinion. The court noted that the judge and his children, at the time of the trial, held less than 1/25th of 1% of the stock, and at the time of denial of the motion for a new trial, held less than 2/25ths of 1% of the stock. 566 F.2d at 887.

6. The earlier statute required disqualification by a judge, *inter alia*, under circumstances which would "render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U.S.C. §455 (1970) (amended 1974).

has an interest that is different from that of the general public in seeing the criminal convicted." 566 F.2d at 888 (footnote omitted). We believe that this view more nearly accords with the legislative intent in amending the statute to contain an objective standard.

We stress that we find no bias-in-fact by the trial judge in this case, nor has any been charged.[7] However, one of the principal functions of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impersonality of judicial decisionmaking. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. at 746-47. We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding because the strict overarching standard imposed by section 455(a) requires that the appearance of impartiality be maintained.[8]

The failure of the trial judge to disqualify himself inthis case, *sua sponte*, does not require reversal of the conviction. The statute differentiates between disqualification under sections 455(a) and 455(b) in one significant respect. A judge is prohibited from accepting from the parties a waiver of the judge's disqualification where

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7. Personal bias on the part of a judge against a party, is a separate, mandatory ground for disqualification under the overlapping provisions of 28 U.S.C. §144 and 28 U.S.C. §455(b)(1).

8. *See* Anderson v. Commonwealth, 117 S.W. 364, 368-69 (Ky. 1909) (criminal action against person who had defrauded a bank; trial judge who was stockholder and director of second bank which was major creditor of defrauded bank could not have the required "equipoise of mind"); *cf.* Salina v. Commonwealth, 217 Va. 92, 225 S.E.2d 199 (1976) (defendant on trial for grand larceny from two banks has right to challenge for cause any veniremen who was a stockholder in either bank). *But see* Commonwealth v. Perry, 468 Pa. 515, 364 A.2d 312 (1976) (divided court upheld failure of trial judge to disqualify himself because he was an acquaintance of the murder victim).

it is based on any of the specific grounds set forth in subsection (b). In contrast, where the basis of the judge's disqualification is because "his impartiality might reasonably be questioned" under subsection (a), a waiver is permitted after a full disclosure on the record of the bases for disqualification. 28 U.S.C. §455(e); *see* House Report at 7, *reprinted* in 1974 U.S. Code Cong. & Ad. News at 6357.

The record shows that the district judge in this case made a full disclosure on the record of the relevant facts which now serve as the grounds on which new counsel bases the disqualification claim.[9] Although the colloquy between the judge and trial counsel was apparently directed to the possibility of disqualification under section 455(b)(4), and did not specifically address disqualification under section 455(a), the information disclosed was sufficient to put defense counsel on notice of the relationship between the judge and INA. *See United States v. Conforte*, 624 F.2d 869, 878-82 (9th Cir. 1980). This is not a case where the nature of the disqualifying relationship was not discovered until the trial was concluded. *Compare Potashnick v. Port City Construction Co.*, 609 F.2d at 1114-15. The judge advised defense counsel before the trial began that he had a finanical interest in INA and that this interest was substantial. Counsel made no request for any further information either at the time of the on-the-record colloquy or at any time thereafter during the five-day trial.

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9. The government urges that because there was no objection raising the disqualification of the district judge under §455, the plain error standard is applicable to our review of this issue. It correctly cites our prior decision in United States v. Schreiber, 599 F.2d 534 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979), as support. We need not reach the applicability of the plain error doctrine because in this case, unlike *Schreiber* where "[t]he subject of impartiality was not broached until the hearing on Schreiber's motion for a new trial," *id.* at 539 (concurring opinion), there is an adequate basis for finding a waiver under the statute.

We believe that under the circumstances of this case the failure to object constitutes a waiver of disqualification covered by section 455(e). The statute in its present form, unlike the Code of Judicial Conduct,[10] does not regulate the detailed manner in which the waiver must be effected. The advantages of following the waiver procedure outlined in the Code are manifest but it is sufficient under the statute if the judge provides full disclosure of his or her relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion.[11] The election to proceed after full disclosure

10. Canon 3D of the Code of Judicial Conduct was amended in 1979 to read:

> A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's disqualification should be waived, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Code of Judicial Conduct Canon 3D (1979). Although Congress was aware of the formal procedure which could be required for waiver, no such procedure was included in the statute. *See, e.g., Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. On the Judiciary*, 93d Cong., 1st Sess. 82 (1973) [hereinafter "Senate Hearings"] (statement of Judge Traynor) (explaining and advocating a procedure requiring written waiver outside of the presence of the judge).

11. *See* Haire v. Cook, 237 Ga. 639, 229 S.E.2d 436 (1976) (construing Georgia law); Commonwealth v. Keigney, 329 N.E.2d 778, 781 (Mass. App. Ct. 1975) (concurring opinion) (construing Massachusetts law). The colloquy which took place between William Westphal, Chief Counsel of the Senate Subcommitte and Professor E. Wayne Thode, Reporter for the Code of Judicial Conduct, at the Senate hearings considering the proposed statute assumes that waiver would be sufficient if the judge were to reveal the ground for disqualification on the record. *See* Senate Hearings at 111-12.

of the relevant facts satisfies those requisites and constitutes an effective waiver under the statute.

II.

The Due Process Issue

The second ground on which defendant bases his request for a new trial is his contention that the trial judge denied him a fair trial by giving the jury the impression that he believed him to be guilty. Defendant points out that the trial judge interrupted his testimony and that of Ms. Gilch more frequently than that of other witnesses. These interruptions sought only more responsive or more audible answers, but defendant argues that the jury drew an inference that the trial judge believed him guilty from their frequency and acidic tone. He also claims that the manner and tone used by the trial judge in delivering the charge to the jury conveyed the court's impression of defendant's guilt.

Due process requires that the trial judge conduct and control a trial so that it is fair and orderly. *See United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981); *United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979); *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir.), *cert. denied*, 439 U.S. 830, 927 (1978). The judge's participation must never reach the point where "it appears clear to the jury that the court believes the accused is guilty." *United States v. Robinson*, 635 F.2d at 984 (quoting *United States v. Nazzaro*, 472 F.2d 302, 303 (2d Cir. 1973)).

A trial judge must be vigilant not to let his or her tone of voice or gestures indicate the judge's view on the defendant's guilt or innocence. Where a videotape or sound recording of the trial is in the appellate record, it may be used to support the claim that a defendant was denied a fair trial by the trial judge's actions. *Cf. United States v. Robinson*, 635 F.2d at 984 n.2 (appellate court

unable to evaluate claims of prejudice deriving from trial court's facial expressions and tone of voice in the absence of video or sound recording of the trial); *United States v. Weiss*, 491 F.2d 460, 468 n.2 (2d Cir.) (same), *cert. denied*, 419 U.S. 833 (1974). Even with such aids, it is unlikely that they can fully convey subtle impressions which depend on the entire atmosphere of the trial and which cannot practically be replicated for appellate evaluation, unless the unfairness is manifest.

Trial counsel for the defendant did not interpose a contemporaneous objection to the trial judge's interruptions or tone of voice nor did he request a curative instruction on the charge. Consequently, we review these contentions under the plain error standard. *See United States v. Schreiber*, 599 F.2d at 535. To meet that standard the error must be " 'grievous', or 'so fundamental in nature as to deprive a party of fundamental justice', or otherwise constitut[e] a 'manifest miscarriage of justice.' " *Id.* (citations omitted). A strict standard of review is particularly appropriate here because an objection would have permitted the trial court to correct any impression that might have been inadvertently conveyed to the jury by his prior tone of voice.

We have examined the record and cannot conclude that the trial judge's tone or conduct deprived defendant of a fair trial. We will therefore affirm the judgment of conviction.

ROSENN, *Circuit Judge*, Concurring.

I concur in the result reached by the majority and join in that portion of part I of their opinion that discusses disqualification under 28 U.S.C. §455(b) and I join in part II of the opinion dealing with the due process issue.

I write separately, however, because it is not clear on the record in this case that the defendant elected to waive the general disqualification provision contained in section 455(a) of the statute. It appears that shortly before the defendant's trial was to begin, the district court called counsel into his chambers and advised them that he was a "substantial holder of INA stock." The court expressed the belief that this provided "no basis for recusal," and counsel for defendant Nobel replied that from his own research he had reached the same conclusion. The majority concedes that in this discussion the parties and the district court were focusing their attention on section 455(b)(4) and did not address the disqualification requirements of section 455(a). Typescript at 9. Indeed, even the Government acknowledged this point in its brief:

> [T]he government will not argue to this Court that Nobel waived his right to seek disqualification under Section 455(a). The government believes that there is some force to Nobel's argument (Brief at 13-14) that the colloquy did not specifically address disqualification under Section 455(a) . . . . Accordingly, the government does not argue here that Nobel waived the protection of Section 455(a).

Because there is no dispute between the parties to this case as to whether Nobel waived his rights under section 455(a), I believe it is extremely ill-advised for this court to use the instant case as a vehicle to enter into an examination of the waiver question and ultimately to dispose of the case on a ground that the United States has seen fit to concede.

It is important to remember that the entire thrust of the disqualification statute is to impose on the judge an independent duty to consider whether his participation in the case will raise questions concerning his impartiality. Even if neither party raises the disqualification question, the judge must do so *sua sponte*. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980); *United States v. Schreiber*, 599 F.2d 534, 539 (3d Cir.) (Seitz, C.J., concurring), *cert. denied*, 444 U.S. 843 (1979). Because the provisions of section 455 are mandatory and are addressed to the trial judge, I am reluctant to conclude, as the majority does, that the mere act of proceeding to trial after disclosure of facts establishing a basis for disqualification constitutes a waiver of section 455(a). *See SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977). I see no need on this record to decide this difficult waiver question.

Nevertheless, I concur in the judgment reached by the majority because I do not believe that the district court's failure to recuse himself constituted legal error under section 455(a). Although there may be circumstances in which a trial judge's financial interest in a victim of a crime may compel his disqualification in a criminal trial, I do not believe that the record in this case establishes that the failure to disqualify under section 455(a) warrants a new trial. First, as the judge had no financial interest in the parties or in the subject matter which would have disqualified him under section 455(b), the only arguable basis for disqualification under section 455(a) would have been that his financial interest in the victim appeared to involve him emotionally in the case. But this is highly implausible under the circumstances here because the defendant had previously entered into a restitution settlement with the victim which would have made it whole. Second, because defense counsel assented to the court's participation at trial when counsel and the trial judge discussed the question of disqualification under section 455(b)(4), it would ap-

pear that defense counsel himself had no reason to believe that the judge would be unable to preside over the proceedings in an impartial manner. Third, the defendant's failure to object at trial on section 455(a) grounds subjects him to a particularly heavy burden on appeal to show that the court's impartiality might reasonably be questioned. *See United States v. Schreiber, supra*, 599 F.2d 534. Although in retrospect the district court could have avoided this challenge to his participation by recusing himself, I do not think his failure to do so under the circumstances in this case rises to the level of "plain error" that the defendant must establish to obtain a new trial.

I therefore concur in the result reached by the majority and would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.)

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1234

UNITED STATES OF AMERICA

v.

NOBEL, HARVEY

Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, Circuit Judges

The petition for rehearing filed by Appellant, Harvey Nobel, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Delores Sloviter, J.

Circuit Judge

Dated: January 5, 1982

CERTIFICATE OF SERVICE

I, Stephen M. Orlofsky, a member of the Bar of this Court, hereby certify that the attached Petition for a Writ of Certiorari was served upon all parties required to be served, as follows:

1. By depositing three copies thereof in the United States Mail, first class, postage prepaid, on March 3, 1983, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

2. By hand-delivering three copies thereof on March 3, 1983, to:

Office of the United States
Attorney
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No. 82-1464

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARVEY NOBEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for interstate shipment of a security taken by fraud should be reversed because the trial judge, a stockholder in the defrauded company, did not disqualify himself, when petitioner specifically refrained from asking the judge to disqualify himself.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Department of Energy v. *Brimmer*, 673 F.2d 1287 8

Rodgers, In re, 537 F.2d 1196 6

United States v. *Ravich*, 421 F.2d 1196, cert. denied, 400 U.S. 834 8

United States v. *Sellers*, 566 F.2d 884 ..... 7, 8

Statutes:

18 U.S.C. 2314 1

28 U.S.C. 455(a) 3, 4, 5, 7, 8

28 U.S.C. 455(b)(2) 6

28 U.S.C. 455(b)(4) 3, 5, 6

28 U.S.C. 455(e) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B3-B18) is reported at 696 F.2d 231.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on December 17, 1982. A petition for rehearing was denied on January 5, 1983 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 14 counts of a 15-count indictment charging interstate transportation of securities taken by fraud, in violation of 18 U.S.C. 2314 (Pet. App. B4). The district

court sentenced petitioner to concurrent 30-month terms of imprisonment on each count.

1. The indictment charged that petitioner, the owner of Beaverbrook Motors, a New Jersey towing service, and Christine Gilch, an employee of the Insurance Company of America (INA), devised a scheme to defraud INA, pursuant to which INA paid petitioner's company approximately $476,000 for nonexistent towing services. Gilch pled guilty and testified for the government. Prior to petitioner's indictment, he and INA entered into a settlement agreement that required petitioner to repay INA substantially all the funds he received as a result of the fraud.[1]

Petitioner's trial began on March 15, 1982. On that day, shortly before trial, the following colloquy occurred in the district judge's chambers (Pet. App. A1, B5):

> THE COURT: Counsel will recall a conference on the 18th of December, 1981, at 8:30 A.M., and I related that I am a substantial holder of INA stock.
>
> INA is not a party; nor is it the subject matter.
>
> I related that I didn't believe it was a basis for recusal.
>
> Now, when we had this conference neither Mr. Casper [Gilch's attorney] nor Mr. Nasuti [petitioner's attorney] were yet retained and my notes reflect that Mr. Casper anticipated no problem, and if, as I believe, there is no basis for recusal, would you, if you are so disposed, so relate.
>
> MR. NASUTI: Me, Your Honor?
>
> THE COURT: Yes.

---

[1]The agreement is appended to the brief filed by the government in the court of appeals.

MR. NASUTI: Yes, Your Honor.

THE COURT: So you agree there is no basis for recusal.

MR. NASUTI: My research reveals that, agrees with Your Honor.

THE COURT: All right.

MR. NASUTI: With Your Honor's research and conclusion.

The December 18, 1981, conference adverted to in the above colloquy is unreported. No further discussion of recusal followed the March 15 conference.

On appeal, petitioner contended for the first time that his conviction should be reversed because the district judge should have recused himself. Petitioner relied on 28 U.S.C. 455(b)(4), which provides that a judge should disqualify himself if "[h]e knows that he * * * has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," and on 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

2. The court of appeals rejected petitioner's contention that Section 455(b)(4) required the judge's recusal. The court first ruled that the district judge did not have a financial interest that might be "substantially affected by the outcome of the proceedings" (Pet. App. B7-B9). The court noted that "[i]n some instances, the resolution of a criminal proceeding might have a substantial effect upon the financial affairs of the victim company" (*id.* at B8), but in this case, the settlement agreement obviated any possibility that the outcome of the prosecution could affect the district judge's financial interest. *Ibid.* The court of appeals also ruled that the district judge did not have a "financial interest

in the subject matter in controversy" (*id.* at B9) because "[i]n a criminal action, the victim is not the 'matter acted upon,' the 'matter presented for consideration,' nor 'the topic of dispute in a legal matter' * * *. The affairs of INA, the company defrauded, were not being resolved by the criminal proceeding nor were they the topic of dispute." *Id.* at B8-B9 (footnote omitted).

The court of appeals did rule, however, that the district judge's interest in INA was a sufficient ground for disqualification under the "appearance of impartiality" criterion of Section 455(a). Pet. App. B9-B11. The court of appeals "stress[ed] that" there was "no bias-in-fact by the trial judge in this case, nor has any been charged." *Id.* at B11 (footnote omitted). But the court declared: "We adopt the view that a judge who owns a substantial interest in the victim of a crime must disqualify himself or herself in the subsequent criminal proceeding" (*ibid.*). Nonetheless, the court of appeals did not reverse petitioner's conviction. The court explained (Pet. App. B12; footnote and citations omitted):

> The record shows that the district judge in this case made a full disclosure on the record of the relevant facts which now serve as the grounds on which new counsel bases the disqualification claim. Although the colloquy between the judge and trial counsel was apparently directed to the possibility of disqualification under section 455(b)(4), and did not specifically address disqualification under section 455(a), the information disclosed was sufficient to put defense counsel on notice of the relationship between the judge and INA. This is not a case where the nature of the disqualifying relationship was not discovered until the trial was concluded. The judge advised defense counsel before the trial began that he had a financial interest in INA and that this interest was substantial. Counsel made no

> request for any further information either at the time of the on-the-record colloquy or at any time thereafter during the five-day trial.

Judge Rosenn concurred in the result. He agreed with the majority's explanation of why the district judge's failure to disqualify himself did not violate Section 455(b)(4). Pet. App. B16. But in connection with Section 455(a), Judge Rosenn criticized the majority for establishing a blanket rule that a judge with a financial interest in the victim of a crime must always disqualify himself from the criminal prosecution, and then finding a "waiver" in this case. Judge Rosenn concluded instead that "[a]lthough there may be circumstances in which a trial judge's financial interest in a victim of a crime may compel his disqualification in a criminal trial, I do not believe that the record in this case establishes that the failure to disqualify under section 455(a) warrants a new trial" (*id.* at B17). Accordingly, Judge Rosenn found it unnecessary to find a "waiver" by petitioner in this case. *Id.* at B16.

Judge Rosenn gave three reasons for concluding that the district judge's failure to disqualify himself did not warrant the reversal of petitioner's conviction. First, he noted that the settlement agreement, which made the victim whole, made it "highly implausible" to suggest that the district judge's financial interest would have "appeared to involve him emotionally in the case." Pet. App. B17. Second, Judge Rosenn reasoned, "because defense counsel assented to the court's participation at trial when counsel and the trial judge discussed the question of disqualification under section 455(b)(4), it would appear that defense counsel himself had no reason to believe that the judge would be unable to preside * * * in an impartial manner." *Id.* at B17-B18. Finally, Judge Rosenn noted that whatever the proper resolution of the "waiver" issue, defense counsel plainly did not

"object at trial on section 455(a) grounds" and that this "subjects him to a particularly heavy burden on appeal to show that the court's impartiality might reasonably be questioned." *Id.* at B18.

ARGUMENT

The judgment of the court of appeals is correct, and petitioner fails to show that the court committed any error warranting this Court's review.

1. Petitioner conceded at trial, and the court of appeals unanimously held, that 28 U.S.C. 455(b)(4) did not require the district judge to disqualify himself. Petitioner now makes only a cursory argument to the contrary (Pet. 29-31). His suggestion that the victim of a crime is "the subject matter in controversy" at the subsequent criminal trial is contrary to the plain meaning of the language and unsupported by any case petitioner cites.

Petitioner's assertion of a conflict with *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976) is incorrect: *Rodgers* concerned 28 U.S.C. 455(b)(2), which requires a judge to disqualify himself "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it"; *Rodgers* held only that a judge must disqualify himself from a criminal trial if the defendants intend to call his former law partner to give concededly relevant testimony. This holding plainly has no bearing on the question presented here. In fact, as petitioner elsewhere remarks (Pet. 16-17), the Fourth Circuit has specifically held that a judge with a financial interest in the victim of a crime need not disqualify himself. "No reason appears why owning stock in a holding company owning a bank that is robbed would lead to any reasonable apprehension that the stockholder judge would be partial.

* * * [A]ny interest the judge might possibly have in the case is so remote as to be for all practical purposes nonexistent." *United States* v. *Sellers*, 566 F.2d 884, 887 (4th Cir. 1977).

2. The only remaining issue is whether petitioner's conviction should be reversed because of the judge's failure to disqualify himself *sua sponte* under Section 455(a). Section 455(e) specifically permits a judge to accept a waiver of a ground for disqualification arising under Section 455(a). But because the March 15, 1982, colloquy in the judge's chambers did not focus specifically on Section 455(a), the government advised the court of appeals that it would not argue that petitioner's counsel's statements were a technical "waiver" within the meaning of Section 455(e).

But as the government also noted in the court of appeals (Gov't C.A. Br. 12-13), and as Judge Rosenn pointed out, whether or not there was a "waiver," the statements of petitioner's counsel, and his failure to object to the judge's decision to continue to preside, are plainly relevant to the question whether petitioner's conviction should be reversed. Counsel's attention was specifically focused on the question of disqualification, and he was invited to state his views. The fact that defense counsel offered no objection in these circumstances—or at any subsequent point during the trial—strongly suggests that the judge's impartiality could not "reasonably be questioned."

Moreover, petitioner is unable to explain why the judge's stock holdings might have called his impartiality into question. The settlement agreement between INA and petitioner ensured that the outcome of the prosecution could not possibly affect INA's fortunes.[2] By petitioner's own account

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[2]In any event, the United States Attorney informed the court of appeals that INA, as of the end of 1981, had approximately $11 billion in assets and 22,700 shareholders. Gov't C.A. Br. 14 n.6.

(Pet. 5-6), the only issue at the trial was whether petitioner's admitted acceptance of INA funds to which he was not entitled was innocent or fraudulent, and petitioner does not explain how the judge's financial interest in INA could affect his view of this issue. Other courts of appeals have permitted a judge with a financial interest in the victim of the crime to preside at the trial (see *United States* v. *Sellers*, *supra*; *United States* v. *Ravich*, 421 F.2d 1196, 1205-1206 (2d Cir.), cert. denied, 400 U.S. 834 (1970); see also *Department of Energy* v. *Brimmer*, 673 F.2d 1287, 1294-1295 (Temp. Emer. Ct. App. 1982));[3] indeed, petitioner asserts that the panel majority's dictum is "the first time in any reported decision in the United States" that a court has stated that a judge must be disqualified because of his financial interest in the victim of a crime (Pet. 12). Finally, while they offered somewhat different legal rationales, none of the judges of the court of appeals thought petitioner was entitled to relief. In view of these circumstances, and of the willingness of petitioner's counsel to have the district judge continue to preside, review by this Court is not warranted.

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[3]The court of appeals majority relied on Judge Butzner's dissent in *Sellers*, but that dissent appears to have rested not just on the judge's status as a holder of a financial interest in the bank that had been robbed but on the fact that the judge's brother was the "chief executive officer of the institution * * * ultimately responsible for the security of the institution and the safety of the employees" and that testimony of persons under the supervision of the judge's brother might "conflict[] with other evidence" presented at trial (566 F.2d at 888-889).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

PAGE

CASES:

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 3

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 3

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) 3

United States v. Sellers, 566 F.2d 884 (4th Cir. 1977) 2

STATUTES:

28 U.S.C. §455 1

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PETITIONER'S REPLY BRIEF

Because the trial judge in this case held a substantial stock ownership interest in the Insurance Company of North America, the victim of the crime, the Third Circuit held that he should have disqualified himself under 28 U.S.C. §455. In so holding, the Third Circuit acknowledged that it had established a new rule of law, which was in

direct conflict with the rule in the Fourth Circuit, as enunciated in United States v. Sellers, 566 F.2d 884 (4th Cir. 1977). Indeed, the government has recognized this conflict, and noted that the Third Circuit's decision conflicts with holdings of the Second Circuit and the Temporary Emergency Court of Appeals as well. (Gov't Br. at 8.)

However, while not attacking the propriety of the Third Circuit's decision mandating disqualification, the government seeks to have that court's affirmance of Petitioner's conviction upheld on grounds of "waiver." In arguing that the Third Circuit correctly found there had been a waiver, the government completely ignores the three principal arguments relied upon by Nobel to show there was no waiver.

First, petitioner argued (Pet. 16-20) that the Third Circuit erred in finding a

waiver because it impermissibly imposed its decision upon him as if it had been the law at the time of trial. Petitioner relied upon England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964), and Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The government's brief utterly fails to address this argument. Petitioner submits that certiorari should be granted, for the reasons stated in his Petition, to address this issue.

Second, petitioner explained (Pet. 20-23) the direct conflict between the Third and Seventh Circuits concerning whether failure to object to the judge's participation can constitute a waiver under §455. SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977), held that a party has no duty to object under the statute, and

therefore failure to object cannot be a waiver. The Third Circuit's decision in this case is in direct conflict with that holding.

As previously noted (Pet. 22), prompt resolution of this conflict is especially important because of its impact upon the relationship of lawyers and judges in dealing with the issue of judicial disqualification. Despite this fact, the goverment's brief totally ignores this issue.

Again, Petitioner submits that certiorari should be granted to resolve this conflict.

Third, the government, in its Court of Appeals brief (authored by the government attorney present during the colloquy with the District Court), expressly conceded that there had been no waiver. The

language of the colloquy supports this concession. Nevertheless, the Court of Appeals ruled that there had been a waiver, and the government now appears to support that view.

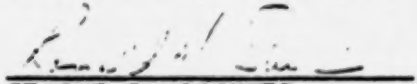
Congress has explicitly directed that purported waivers of disqualification be strictly construed. (Pet. 23-25.) The government's brief ignores this. Since in this case even the government cannot decide if it should argue waiver, it follows that the "waiver" was at best equivocal. To hold in such a case that the trial judge was required to disqualify himself, but that petitioner had waived that right, would fly in the face of clear Congressional intent.

Conclusion

The government's reply ignores the crucial issues relating to waiver raised in the Petition. Petitioner submits that

there are compelling reasons why certiorari should be granted in this case, and the government's reply raises no contrary considerations.

Respectfully submitted,



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CERTIFICATE OF SERVICES

I, Ronald H. Surkin, a member of the Bar of this Court, hereby certify that the attached Petitioner's Reply Brief was served upon all parties required to be served, as follows:

1. By depositing three copies thereof in the United States Mail, first class, postage prepaid, on June 1, 1983, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

2. By hand-delivering three copies thereof on June 1, 1983, to:

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